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No. 00-1052

IN THE

Supreme Court of the United States

UTILITIES COMMISSION, CITY OF NEW SMYRNA BEACH, FLORIDA,

Petitioner,

v.

TAMPA ELECTRIC COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Florida Power & Light Company, is a wholly owned subsidiary of FPL Group Inc. which is publicly traded.

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INTRODUCTION

Through a carefully crafted series of statutes and regulations, the State of Florida has created a mechanism for balancing the ever-increasing energy demands of a growing population with the essential need to protect its fragile and constantly challenged natural environment. It has done so with a clear understanding of its rights and limitations in areas in which federal activity plays a necessary role.

The Supreme Court of Florida, in the decision challenged here, has simply enforced Florida law in a manner consistent with the need, articulated in the relevant statutes, to examine all of the relevant factors before depositing a large new power plant project on Florida's diminishing landscape.

Petitioner, the City of New Smyrna Beach, Florida ("Petitioner") shares none of the state's concerns. It has a narrow economic interest. It ignores the absolutely fundamental balancing required by law and common sense and invites this Court to do the same.

At issue, in particular, is Section 403.519 of the Florida Statutes (hereinafter the "Need Provision"), which requires the sponsor of a large new steam electrical power plant to demonstrate that it is necessary to meet the needs of specified retail users. Petitioner contends that this requirement is preempted by Federal law or, alternatively, contrary to dormant Commerce Clause jurisprudence. In so arguing, it rips the Need Provision from its regulatory fabric and, characterizing it in improper and unintended isolation, invokes the facile mantra of "economic protectionism." As is evident from both its structure and history, the Need Provision, fairly examined, furthers environmental and conservation goals by fostering disciplined growth of the electric power generation system in Florida. And it does so in a manner that is reasonable and nondiscriminatory.

The Florida legislature has found the adverse effects of overbuilding large power plants to be so undesirable and irreversible that new plants may be built only after a showing of public necessity. Accordingly, the Need Provision requires a threshold showing that a proposed plant is both needed and cost-effective, and that the demand the plant would serve cannot be mitigated through energy conservation programs. The Supreme Court of Florida determined that the plant proposed by Petitioner and its co-petitioner below, Duke Energy New Smyrna Beach Power Company, Ltd. LLP ("Duke") should not be allowed simply because there had been no attempt to make this threshold showing.[1]

The Need Provision operates within an area that Congress has expressly reserved to the states. Indeed, a recurring theme appears in federal electric power legislation: the areas of power plant siting, generation planning and environmental protection have invariably been left to the states to regulate. The very statute that the Petition claim preempts Florida law actually preserves state power over "environmental protection [and] the siting of facilities."[2] The Need Provision falls squarely within the ambit of this express reservation of state power.

STATEMENT OF THE CASE AND OF THE FACTS

I. THE FLORIDA REGULATED ELECTRICAL POWER SYSTEM

Electrical energy in Florida is provided to retail customers by 33 municipally-owned utilities, 5 investor-owned utilities ("IOUs"), including respondent Florida Power & Light Company, and 16 electric cooperatives, each serving a distinct territory. Florida Public Service Commission, *Listing of Electric*

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1. Although Duke was a party to the proceedings below, it has not petitioned for review in this Court.

2. P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

Utilities, http://www.psc.state.fl.us/mcd/MCD-E.html (visited January 17, 2001). Many of the larger utilities self-generate much of their power. Others rely primarily on wholesale, contractual purchases to meet their needs. Regardless of how it obtains energy, however, every utility has an obligation to meet the demands of its retail customers.

The Florida Public Service Commission ("PSC" or the "Commission") regulates the business activities of the Florida utilities in several respects, including the following:[3]

First, Florida law requires IOUs to sell power to all customers within their service territory at rates approved by the PSC. FLA. STAT. §§ 366.03, 366.04(2)(b), 366.05(1) and 366.06 (2000). Rate approval depends in-part upon the most cost-effective means available of acquiring new generation capacity being employed. *See* FLA. STAT. § 366.041 (2000); FLA. ADMIN. CODE. R. 25-22.082 (2000). For example, an IOU must purchase power to meet its capacity needs whenever it would be more cost-effective than adding new self-generation capacity. *Id.* This requirement is echoed in the Need Provision, pursuant to which no new power plant will be allowed if a more cost-effective alternative, such as a power purchase contract from an independent generator, exists.

Second, in order to ensure that all available alternatives are considered, the PSC requires IOUs to employ competitive bidding, by first widely publishing a request for proposals and then analyzing the responses according to criteria set by the PSC. FLA. ADMIN. CODE. R. 25-22.082 (2000). This procedure must be followed before an IOU can seek certification for a new power plant. *Id.*

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3. Municipal utilities and electric cooperatives are subject to less pervasive oversight than IOUs, but still must comply with the Need Provision.

Third, the PSC engages in long-term planning to ensure that adequate electric power reserves are maintained.[4] To facilitate this, Florida law requires utilities to file ten-year site plans, through which they coordinate their growth with the PSC. FLA. STAT. § 186.801 (2000). The PSC has also routinely addressed matters such as planning studies, electric grid reliability, and alternatives to new construction. *See, e.g., In re: Investigation into the Adequacy of the Elec. Transmission Grid in North Florida*, 90 FPSC 12:519 (1990); *In re: Generic Investigation into Planning and Operating Reserve Practices of Peninsular Florida Generating Electric Utilities*, 94 FPSC 10:203 (1994); *In re: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111)*, 94 FPSC 10:392 (1994).

Finally, as discussed below, the PSC is charged with ensuring that every large steam power plant built in Florida is both needed and cost-effective. FLA. STAT. § 403.519 (2000). To do this, it must evaluate the power demands of the customers to be served, determine whether there are alternatives to the new construction, such as contractual power purchases or conservation measures, and determine whether the new plant will be reliable and cost-effective for the utilities whose customers rely on it. FLA. STAT. §§ 403.519, 403.507(2)(a)2 (2000).

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4. Florida is one of the fastest growing states in the union. It is also one of the most ecologically sensitive, containing, for example, among the highest number of sensitive wetlands and protected species of wildlife of any state. *See* United States Fish & Wildlife Service, *Southeast Wetlands*, *http://wetlands.fws.gov/Pubs_Reports/Sewet/index.html*, and *Listed Species by State/Territory*, *http://ecos.fws.gov/webpage/usmap.html* (visited January 21, 2001). This combination of factors imposes a unique and complex set of regulatory and planning challenges to accommodate rapid growth while protecting and conserving sensitive environmental resources. The balance drawn in the statutory provisions at issue here is but one example of this.

Utilities are permitted to rely on both self-generated and purchased power to meet their customers' projected energy demand and to maintain reserve generation capacity. However, only committed purchased power may be used in capacity planning. Utilities cannot rely upon generating resources that are not contractually committed to be available when needed, and therefore cannot treat such resources as part of their power supply plans. (T3 417, 444; T4 537-38) For this reason, when utilities rely on purchases to meet customer demand, they typically structure firm contracts for specified generating capacity. (T4 538)

II. THE FLORIDA ELECTRICAL POWER PLANT SITING ACT AND ELECTRICAL ENERGY CONSERVATION ACT

Florida regulates the construction of new steam power plants through two statutes: The Florida Electrical Power Plant Siting Act ("Siting Act"), Florida Statutes Sections 403.501 to 403.518, and the Florida Electrical Energy Conservation Act ("FEECA"), Florida Statutes Sections 366.80 to 366.85 and 403.519. The Need Provision was enacted as part of FEECA but serves as the initial step in the application and certification process under the Siting Act. *See* FLA. STAT. §§ 403.519, 403.507(2)(a)2.

The 1973 Siting Act provided a coordinated environmental review of power plant projects. *See* 1973 FLA. LAWS Ch. 73-33. In recognition of the obvious impact these plants have on the environment, ultimate approval authority for power plants was placed at the highest level of the executive branch of state government: the Florida Governor and Cabinet, who sit as the Electrical Power Plant Siting Board. FLA. STAT. § 403.509 (2000).

The drafters of the Siting Act expressly sought to implement coordinated and disciplined growth of the state's electric system:

> The Legislature finds that the present and predicted growth in electric power demands in this state requires the development of a procedure for the selection and utilization of sites for electrical generating facilities and the identification of a state position with respect to each proposed site.
>
> * * *
>
> It is the policy of this state that, while recognizing the pressing need for increased power generation facilities, the state shall ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life and will not unduly conflict with the goals established by the applicable local comprehensive plans. It is the intent to seek courses of action that will fully balance the increasing demands for electrical power plant location and operation with the broad interests of the public.

1973 FLA. LAWS Ch. 73-33, at 73; FLA. STAT. § 403.502 (2000). Providing further evidence of its goal of disciplined growth, the Siting Act bill also required electric utilities to file ten-year site plans and coordinate their capacity growth with the PSC. *See* Laws of Florida, Ch. 73-33, at 76. FLA. STAT. § 186.801 (2000).

The legislative history of the Siting Act demonstrates the intent to limit the building of power plants to only those that are absolutely necessary. During the legislative debates, the Chair of the House Committee on Environmental Protection noted that review under the Siting Act would prevent utilities from "going out and building any power plants [they] don't need." (R9 1765-1821) The Act thus required state regulators first to

"make a determination that there is in fact a need that has to be served, and then . . . balance the ecological considerations with that need." *Ibid.*

The Need Provision was enacted in 1980 as part of FEECA, which was designed to address the rapidly expanding demand for power, and granted the PSC authority to require utilities to develop plans and implement programs for energy conservation. *See* 1980 FLA. LAWS Ch. 80-65; FLA. STAT. §§ 366.81 and 366.82. To further its conservation goals and provide specific criteria for evaluating need, FEECA included the Need Provision, which provides:

> On request by an applicant or on its own motion, the [PSC] shall begin a proceeding to determine the need for an electrical power plant subject to the Florida Electrical Power Plant Siting Act. . . . The commission shall be the sole forum for the determination of this matter, which accordingly shall not be raised in any other forum or in the review of proceedings in such other forum. In making its determination, the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the conservation measures taken by or reasonably available to the applicant or its members which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant. The commission's determination of need for an electrical power plant shall create a presumption of public need and necessity and shall serve as the commission's report required by s. 403.507(2)(a)2. An order entered pursuant to this section constitutes final agency action.

FLA. STAT. § 403.519. Prior to 1980, the PSC's role was to submit an advisory report on the need for the proposed plant, which was considered along with other environmental data in the final siting decision. 1973 FLA. LAWS Ch. 73-33, at 77; FLA. STAT. § 403.507(1) (1979). The Need Provision elevated the issue of need for a proposed plant from what was merely one consideration taken into account by the Governor and Cabinet, to an independent threshold determination that controls whether certification may be issued.

The Need Provision protects Florida against having to bear the inevitable environmental impacts from power plants unless those plants are truly necessary. It requires conservation and energy efficiency programs to be used whenever possible in lieu of new generation. It also serves a consumer protection function by requiring the new plant to be the most cost-effective means of supplying the need found to exist.

In applying the Need Provision to wholesale generators, the PSC initially attempted to evaluate need from a statewide perspective, as Petitioner urged below. However, the PSC concluded that this approach was unworkable, because it failed to take into account the fact that the output of the proposed plant would eventually have to be relied upon by a specific utility or utilities to meet the needs of their customers. *See In re: Hearings on Load Forecasts, Generation Expansion Plans and Cogeneration Prices for Peninsular Florida's Electric Utilities*, 89 FPSC 12:294 (1989); *In re: Petition of Nassau Power Corp. to Determine Need for Electrical Power Plant (Okeechobee County Generation Facility)*, 92 FPSC 10:643 (1992), *aff'd, Nassau Power Corp. v. Deason*, 641 So. 2d 396 (Fla. 1994). The PSC therefore interpreted the Need Provision as "utility-specific," meaning that the needs to be evaluated are those of the retail-serving utilities to which the plant is ultimately committed. *Id.* The Supreme Court of Florida has twice reviewed and approved the PSC's decision to require a utility-specific showing. *See Nassau Power Corp. v. Beard*, 601 So. 2d 1175,

1176-77 (Fla. 1992) ("*Nassau I*"); *Nassau Power Corp. v. Deason*, 641 So. 2d 396, 397-99 (Fla. 1994) ("*Nassau II*"). The PSC consistently applied this approach until the present case, where by a three to two margin it allowed the need certification to be issued on the basis of speculative market opportunity rather than a detailed evaluation of the needs of specific utilities and their customers. Consistent with its earlier precedents, the Supreme Court of Florida reversed the PSC and reaffirmed that the need determination must look at the *actual* needs of the utilities to which the plant capacity is contractually committed. *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 200 P.U.R. 4th 370 (Fla. 2000).

III. THE FEDERAL REGULATORY STRUCTURE

A. The Federal Power Act ("FPA") and Public Utility Holding Company Act ("PUHCA")

Congress first regulated the provision of electric power in 1935, with the passage of FPA and PUHCA. These statutes decentralized the market for electric power and imposed federal controls over wholesale energy transactions and the structure of utility companies. All other aspects of electric utility regulation were left to the states and their political subdivisions.

PUHCA, 15 U.S.C. § 79, *et seq.*, was aimed at large regional monopolies. It forced electric utilities to segregate themselves into smaller companies. PUHCA did not, however, interfere with local regulation of utilities. Indeed, it enhanced state control of electric utilities by restructuring the industry into local companies more fit for state regulation.

FPA sought to facilitate energy transactions between local utilities. It placed regulatory authority over interstate wholesale power transactions with what is now the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824(b)(1). Like PUHCA, FPA did not interfere with state regulation of the electric power industry. Significantly, while vesting FERC with

general jurisdiction over wholesale energy transactions, FPA expressly states that FERC "shall not have jurisdiction [except in instances not applicable here] over facilities used for the generation of electric energy." *Id.* FERC has recognized that this provision reserves to the states exclusive jurisdiction over plant siting, licensing and construction. *Monogohela Power Co.*, 40 FERC & 61,256 (September 17, 1987).

B. The Energy Policy Act of 1992 ("EPAct") and FERC Order No. 888

In 1992 Congress sanctioned the creation of a new class of non-utility Independent Power Producers ("IPPs") by enacting EPAct. EPAct created new exemptions from the ownership restrictions of PUHCA, which allowed utility-affiliate companies such as Duke to develop wholesale power projects. EPAct also created new requirements for open access to electric transmission systems.

While EPAct loosened ownership restrictions, nowhere does it purport to limit state regulatory authority over power plant licensing and siting, or exempt IPPs from state licensing requirements. To the contrary, EPAct expressly preserves the authority of states and local governments to regulate the construction of power plants:

> Nothing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities.

P.L. 102-486 § 731, Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

In 1996, after nearly four years of study and deliberation, FERC implemented the EPAct provisions requiring transmission system open access through a watershed order entitled *Promoting Wholesale Competition Through Open Access*

Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21540 (April 24, 1996). In that order FERC recognized the limited effect of EPAct on state regulatory authority, disavowed any intent to interfere with "the traditional tasks of state . . . regulators," noted that states retain regulatory authority over power production facilities, and took specific note of the fact that "Congress left to the states authority to regulate generation and transmission siting." 61 Fed. Reg. at 21625, 21626 and 21626 n.543 (citing FPA §§ 201(b) and 211(d)(1), and EPAct § 731).

IV. THE PROCEEDINGS BELOW

A. The Proceedings Before the PSC

The present controversy began with a Petition for Determination of Need for an Electrical Power Plant filed jointly by the City and Duke in 1998 (the "Siting Petition"). The Siting Petition alleged that Duke, the project developer, would sell approximately 6 percent of the 514 Megawatt ("MW") capacity of its plant to the City according to pre-negotiated terms, but would make no up-front commitments to sell any of the remaining 94 percent to a specific utility. Rather, Duke indicated that it intended to sell the majority of the energy from the plant as market opportunities arose. According to the Siting Petition, these sales were to be made almost exclusively to electric utilities within Florida: "[V]irtually all — more than 99 percent — of all [*sic*] sales from the Project over the 2002-2012 period are expected to be to other utilities in Peninsular Florida. . . ." *Siting Petition*, p. 19, ¶ 28.

At hearing, Duke and Petitioner simply did not present evidence on many of the criteria of the Need Provision. For example, Petitioner offered no evidence evaluating alternatives to constructing a new 514 MW plant, and no proof that it had exhausted all conservation alternatives that would mitigate the need for the plant. (T3 390-91, 450-52)

Duke acknowledged that the PSC could not determine the prices utilities would pay for power, and therefore could not evaluate cost effectiveness to those utilities. (T3 442; T4 635-37) Duke and Petitioner could also not explain how the uncommitted 94 percent of the plant's capacity would improve the reliability of any utility, since no utility could count on the availability of this capacity to meet its customers' demands. (T3 443-44, 505; T4 538, 562-64, 635-37)

Abandoning its long-standing historical practice, the three-commissioner PSC majority found that the Florida statutory scheme allowed a need certification to be granted based solely on the assertion that there exists a speculative market opportunity for the plant's generation. *Tampa Elec.*, 767 So. 2d at 432.

B. The Decision of the Supreme Court of Florida

On appeal, the Supreme Court of Florida reversed the PSC, reaffirming its holdings in *Nassau I* and *Nassau II* that the criteria of the Need Provision are utility specific. A wholesale power provider must, therefore, have a contractual commitment to a retail-serving utility before applying for need certification:

> We conclude that our analysis of the Siting Act, articulated in [*Nassau I* and *Nassau II*] is applicable to the present case. In *Nassau II* we stated:
>
> > The Siting Act was passed by the legislature in 1973 for the purpose of minimizing the adverse impact of power plants on the environment. *See* §§ 403.502, FLA. STAT. (1989). That Act establishes a site certification process that requires the PSC to determine the need for any proposed power plants, including [independent generating plants], based on the criteria set forth in section 403.519, Florida Statutes (1989). Section

> 403.519 requires the PSC to make specific findings for each electric generating facility proposed in Florida, as to (1) electric system reliability and integrity, (2) the need to provide adequate electricity at a reasonable cost; (3) whether the proposed facility is the most cost-effective alternative available for supplying electricity; and (4) conservation measures reasonably available to mitigate the need for the plant.
>
> * * *
>
> The Commission [has] reasoned that a need determination proceeding is designed to examine the need resulting from an electric utility's duty to serve customers. Non-utility generators . . . have no similar need because they are not required to serve customers. The Commission's interpretation of section 403.519 also comports with this Court's decision in *Nassau Power Corp. v. Beard*. In that decision, we rejected Nassau's argument that "the Siting Act does not require the PSC to determine need on a utility-specific basis." 601 So. 2d at 1178 n. 9. Rather, we agreed with the Commission that the need to be determined under section 403.519 is "the need of the entity ultimately consuming the power," in this case FPL.' [*Nassau II*]. 641 So. 2d at 397, 398-99 (footnote omitted).

Tampa Elec., 767 So. 2d at 433-34 (quoting *Nassau II*, 641 So. 2d at 387, 398-99).

Applying its longstanding interpretation of the Need Provision, the court found that the required evaluation could not be performed until the project's power output was contractually committed to a retail utility or utilities:[5]

> Th[e] need determination, pursuant to section 403.519, contemplates the PSC's express consideration of the statutory factors based upon demonstrated specified needs of [specific] Florida Customers. The need determination is part of the process that the Legislature intended by its plain language to balance "the pressing need for increased power generation facilities" with the necessity that the state ensure through available and reasonable methods that the location and operation of electrical power plants will produce minimal adverse effects on human health, the environment, the ecology of the land and its wildlife, and the ecology of state waters and their aquatic life. § 403.502, FLA. STAT. (1997).
>
> Accordingly, we find that the statutory scheme embodied in the Sitting Act and FEECA was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates.

Tampa Elec., 767 So. 2d at 435.

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5. As construed by the Supreme Court of Florida, the purpose of this contracting requirement is not economic protectionism, but rather "minimizing the adverse impact of power plants on the environment" by allowing only those plants that are truly necessary to be built. *Tampa Elec.*, 767 So. 2d at 433, 435. This evaluation cannot be performed until a commitment to serve the needs of specific utility customers is made, and the terms and conditions under which the power will be committed and sold are known. *Id.* at 435.

Turning to the federal issues raised before this Court, the Florida court held that because Congress expressly reserved to the states jurisdiction over power plant siting, the Florida statutory scheme was constitutionally permissible and not in conflict with federal law. *Id.* at 436. The court therefore found the federal issues raised by Petitioner to be without merit.

SUMMARY OF THE ARGUMENT

Florida has a well-developed statutory process that balances the need of consumers for electrical energy with the need to protect its fragile natural environment. Petitioner did not meet those stringent, but impartial, standards. Its application for a license to build a new power plant was properly denied because it made no showing that the plant was necessary to meet the specific demands of end users. Unable to demonstrate compliance with these rational requirements, Petitioner mischaracterizes and then attacks the Need Provision as an improper protectionist measure.

The Need Provision applies uniformly to *any* entity intending to build a power plant in Florida. It requires a detailed review by state regulators to determine whether a proposed plant is truly necessary, and whether it will be a reliable and cost-effective source of power for the customers that rely on it. This requirement does nor prevent anyone from building a power plant in Florida; it merely requires the details of how, to whom, and under what terms the power from a project will be sold to be known before a certification application can be reviewed by state regulators.

Read as a whole, the Florida statutory scheme demonstrates a clear intent to further legitimate environmental protection and conservation goals. This is confirmed by the history of the Need Provision, which reflects the Florida legislature's determination that, because of their inevitable environmental effects, construction of large power plants in the state should not be allowed unless a proposed plant is needed to meet a proven

retail demand that cannot be mitigated through conservation measures. The Supreme Court of Florida has determined that the only way to accomplish the evaluation required under Florida law is to evaluate the need for power of the retail utilities (*i.e.*, those that directly serve end-users) to which a wholesale-only plant is contractually committed.

The Need Provision does not conflict with the federal laws cited by Petitioner. Congress never intended to foreclose or limit state regulation over power plants, and has expressly indicated that the very statutes cited by Petitioner are not to be construed as limiting state authority over this area. Moreover, FERC, the agency with primary responsibility for implementing federal energy policy, has repeatedly noted the limited impact of federal energy law on state regulatory powers, and has specifically found that "Congress left to the states authority to regulate generation and transmission siting." 61 Fed. Reg. 21540, 21626 n.543 (April 24, 1996). At every turn, Congress and FERC have acted contrary to the Petitioner's preemption theory and sought to preserve, rather than restrict, state powers. Thus, Congress cannot be said to have preempted the state regulation, or to have adopted a policy that is contrary to it.

Because Congress expressly reserved state authority over power plant licensing and related environmental concerns, no Commerce Clause issue is presented. The dormant aspects of the Commerce Clause restrict state powers only when there is no controlling federal legislation. However, even if the commerce clause applied, the Need Provision would pass constitutional muster. It is a non-discriminatory measure that reasonably furthers legitimate environmental goals and has at most a minor and incidental effect on interstate commerce.

The arguments raised by Petitioner are thus without merit and do not warrant review by this Court. Moreover, this Court has previously noted that questions regarding the extent to which public utilities should be regulated are best resolved by the political branches, rather than through constitutional litigation.

The Court has, for this reason, refused to grant relief to Petitioners who made far more compelling constitutional arguments in cases involving utility regulation. *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 307 (1997). The principle of judicial restraint espoused in *General Motors* has particular applicability in the present case because the Florida Governor and legislature will over the next year evaluate whether to pursue restructuring of the electric industry in the state. Given Congress' clear intent to have these issues resolved by the states, this Court should deny the Petition and allow the state political process to play out free from judicial intervention.

REASONS FOR DENYING THE WRIT

I. THE NEED PROVISION OPERATES WITHIN AN AREA EXPRESSLY RESERVED TO THE STATES BY CONGRESS

State regulations can be superceded by federal law in three ways. *First*, Congress can expressly preempt an area of regulation, prohibiting the states from exercising any authority over the subject matter. *Pacific Gas & Elec. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983) ("*PG&E*"). *Second*, under the doctrine of implied preemption, a federal regulatory program can be so pervasive that an intent to preclude state laws on the same subject will be inferred. *Id. Finally*, a state law can conflict with a federal law such that "compliance with both federal and state regulations is a physical impossibility," or the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* None of these principles applies here.

Over the past 65 years of electric utility regulation, Congress has consistently preserved traditional state authority over power plant licensing and environmental protection. *See supra*, pp. 9-11. Congress has the power to subsume the field of electric utility regulation. But it made a conscious decision not to do so, and has instead left most aspects of utility regulation to the

states. *Id.* Thus, Congress cannot be said to have expressly preempted state regulation of power plants, nor, by its limited enactments in the area, to have fully occupied the field of utility regulation such that a preemptive intent can be inferred.

The Petition identifies no federal provision that conflicts with the Need Provision. Given the express reservation of state jurisdiction over power plant siting and environmental protection, and the lack of any federal provision that conflicts with the Florida statute, Petitioner is left to argue that the Need Provision is contrary to the "goals and policies of federal law."[6] *Petition* at 13-18. As support, the Petition relies heavily on FERC Order No. 888 and a discussion of the history of EPAct to argue that there is a national policy in favor of wholesale electric competition. *Id.* But the Petitioner conveniently ignores the fact that in the midst of their limited provisions promoting wholesale competition, both the FERC order and EPAct clearly and unequivocally reserve to the states authority over power plant licensing and siting and environmental protection. Section 731 of EPAct provides that it shall not "be construed as affecting or intending to affect, or in any way interfere with, the authority of any State or local government relating to environmental protection or siting of facilities."[7] And FERC Order No. 888 observes that "Congress left to the States authority to regulate generation and transmission siting. *See* FPA section 201(b) and 211(d)(1); Section 731 of the Energy Policy Act." 61 Fed. Reg. at 21625-26. Congress obviously has no goal or policy of interfering with state environmental and power plant licensing regulation.

Acting within the area reserved to the states by Congress, the Need Provision imposes reasonable conditions on new power

6. This resort to vague "policies" that have no cited basis in statutory language, underscores the fact that the Need Provision does not conflict with the express terms of any federal law.

7. P.L. 102-486 § 731 Title VII, Sub. C, 1992 U.S.C.C.A.N. (106 Stat.) 2776, 2921 (Oct. 24, 1992), note to 15 U.S.C. § 79.

plant construction. It in no way precludes the development of independent power plants, so long as the developers of those plants make specific commitments for sale of their power, and prove that the plant is necessary to meet the buyers' needs. As discussed above (*supra*, pp. 5-8) this requirement was imposed to serve the reasonable environmental goal of limiting the development of large power plants to only those plants that are truly necessary. The Need Provision was not passed to interfere with the goals or policies of EPAct and has, at most, an incidental effect on those goals and policies.

A limited and incidental effect of a state law upon a generic federal goal or policy is not enough to support a finding of preemption. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1984) (rejecting argument that coal severance tax was preempted because it frustrated national energy policy). This principle is firmly established in *Commonwealth Edison* and in the case relied upon in the Petition for its "goals and policies" argument: *Pacific Gas & Elec. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) ("*PG&E*").

In *PG&E* this Court reviewed a California statute regulating the construction of nuclear power plants that was challenged as preempted by the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, and national energy policy. The statute at issue constituted an absolute moratorium on nuclear power plant development, until such time as state regulators determined that adequate permanent storage facilities had been established by federal agencies for spent nuclear fuel. *PG&E*, 461 U.S. at 194, 198.

The Court found that states have traditionally regulated all aspects of electricity production, and that Congress intended that "the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States nonetheless retain their traditional responsibility in the field of regulating electric utilities

for determining questions of need, reliability, cost and other related state concerns." *Id.* at 191, 205-06. In enacting the moratorium, California regulators were primarily concerned with the impacts of the lack of adequate waste disposal facilities on the long term economic viability of nuclear plants. Thus, while the California licensing statute was related to the availability of long-term radioactive waste disposal — an area of exclusive federal responsibility — it was found by the Court to have been enacted for the permissible purpose of assuring that new plants will remain economically viable. *Id.* at 223. Accordingly, the statute was upheld, notwithstanding the fact that it would have the incidental effect of impeding the general federal goal of fostering the use of nuclear power. *Id.* ("Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which our system assigns to Congress").

The parallels are obvious. In the case at hand, Congress has acted merely to remove the federal restrictions that limited the creation of IPPs and to facilitate open access to electric transmission lines. As in *PG&E*, Congress did not purport to divest states of their traditional authority over the need for new plants, nor did it direct states to unconditionally approve plants proposed by the new class of IPPs. To the contrary, the federal statutes cited in the Petition reserve state authority over plant licensing and environmental regulation. A review of the history and purpose of the Need Provision inescapably leads to the conclusion that it was enacted for the very purposes carved out for state regulation by Congress. There is no cause to strike the statute based on its incidental effects on national goals and policies.

II. NO DORMANT COMMERCE CLAUSE ISSUE IS IMPLICATED BECAUSE CONGRESS RESERVED POWER OVER POWER PLANT SITING TO THE STATES

In Article I, Section 8 of the United States Constitution, Congress is granted the power to "regulate Commerce . . . among the several states." This Court has held that "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation . . . or regulation . . . that discriminates against or unduly burdens interstate commerce and thereby 'impede[s] free private trade in the national marketplace.' " *General Motors Corp. v. Tracy,* 519 U.S. 278, 300 (1997) (*quoting Reeves, Inc. v. Stake* 447 U.S. 429 (1980)). The Court has made clear, however, that dormant Commerce Clause considerations are overridden where Congress has expressly authorized the type of state regulation at issue.[8] The Petition itself acknowledges this central principle: "[A]ny state regulation of interstate commerce is subject to scrutiny under the dormant Commerce Clause, **unless such regulation has been preempted or expressly authorized by Congress.**" *Petition,* at 20 (citing *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County,* 48 F.3d 701 (3d Cir. 1995)) (emphasis added).

As discussed above, in EPAct Congress expressly reserved power over licensing, siting and environmental regulation of power plants to the states. Accordingly, the operation of state laws such as the Siting Act was expressly envisioned by Congress and cannot be said to be a violation of the dormant Commerce Clause. Congress must have contemplated that this exercise of state authority would have an incidental effect on the implementation of EPAct. *See Northwest Central,* 489 U.S. at 524. (Congress should be presumed to have known

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8. *See Northwest Cen. Pipeline Corp. v. Corporation Comm'n of Kansas,* 489 U.S. 493 (1988); *Lewis v. B.T. Investment Managers, Inc.,* 447 U.S. 27 (1980); *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408 (1946).

that its reservation of state regulatory authority would result in state programs that impact interstate commerce). It nevertheless chose expressly to preserve state power over these matters. If Congress meant to exempt IPPs from state siting authority, it would have done so. The fact that the opposite course was chosen negates any claim under the dormant commerce clause. *See Northwest Central*, 489 U.S. at 524 (there is little point to a reservation of power to the states "if the inevitable repercussions of States' exercise of this power in the arena of interstate commerce meant that a State could not constitutionally" act).

III. THE NEED PROVISION IS A PERMISSIBLE REGULATION UNDER TRADITIONAL COMMERCE CLAUSE ANALYSIS

Even if Congress had not reserved to the states their traditional authority to regulate power plant licensing and siting, the Need Provision would easily pass muster under traditional commerce clause analysis for the reasons that follow.

A. The Need Provision is Non-Discriminatory, Does Not Bar Market Access and is Reasonable.

1. The Need Provision Does Not Discriminate in Favor of Domestic Corporations

Like the rest of Florida's environmental and utility regulatory statutes, the Need Provision, on its face, applies to *every* entity wishing to construct a large new steam power plant in Florida. Its restrictions are imposed on all power plant developers, foreign and domestic. Likewise, the requirement of a commitment to specific retail customers must be met regardless of who applies. An in-state developer could not have secured need certification based on a mere speculative market opportunity any more than Duke could. It is the lack of a contractual commitment to meet specific demand, and not the citizenship of the applicant, that determines this result. Indeed, because of the absence of such a commitment, the Petition failed

to address many of the express requirements of the Need Provision, including proof of the demand for power of specific customers, proof that there was no adequate conservation alternative, and, proof that the power would be cost-effective and reliably available to the purchasers. *See supra*, pp. 11-12.

2. The Need Provision Does Not Bar Access to Florida's Markets

While the Need Provision places conditions on the construction of new power plants in Florida, it in no way forecloses access to Florida's electric market. There is no prohibition on IPPs building plants within the state. All that Florida law requires is that arrangements for the sale of power be made *before* certification is sought, so that the PSC can fulfill its statutory duty to evaluate the need for and cost-effectiveness of project from the perspective of the customers to be served.

Duke never even attempted to obtain firm contracts for the uncommitted 94 percent of its proposed plant's capacity. Yet, it had ample opportunity to do so. Because they have a duty to minimize cost, utilities *must* enter into such contracts when they are the most cost-effective means of securing needed generation capacity. Indeed, pursuant to the very statute challenged here, the PSC would be required to reject any application for new power plant construction by a utility that had a less costly power purchase option available to it.

The Petition is rife with suggestions that, unless this Court strikes down the Need Provision, power plants such as the one proposed by Duke and Petitioner cannot be built in Florida. This is simply wrong. As discussed above, the Florida and federal regulatory schemes ensure that IPPs have every opportunity to sell their project's capacity to Florida retail utilities and cooperatives. The Need Provision merely requires that IPPs enter into arrangements for power sales, and prove that the project is needed by the purchasing utilities, before embarking on new construction. Duke's decision to reserve the

bulk of its plant's output for later sale is inconsistent with the entire purpose of the Need Provision, as it precluded state regulators from conducting a meaningful inquiry into the question of whether the proposed plant was truly necessary.

3. *The Need Provision Is a Reasonable Regulatory Measure*

Requiring a showing of need for a new power plant is not a novel concept. Many other states recognize, as Florida has, that large power plants have inevitable and far reaching environmental effects that can scar the landscape and harm environmental resources long after the plant ceases to be operate. Each state's limited resources can support only so many power plants. For this reason, states often impose some form of need review prior to allowing a new power plant to be built.[9]

By regulating the building of electric power plants as it has, Florida has protected its environment and also avoided the sort of uncontrolled market disruptions that have recently bedeviled California.[10] The requirement of a commitment to serve specific retail demand has helped ensure both that

9. *See, e.g.*, Ill. COMP. STAT. ANN. ch. 220, para. 5/8-406 (2000); N.C. GEN. STAT. § 62-110.1 (Michie 2000); MISS. CODE ANN. §§ 77-3-11 and 77-3-14 (2000); KY. REV. STAT. ANN. §§ 278.020 and 278.025 (Michie 1998); COLO. REV. STAT. §§ 40-5-101 and 40-5-102 (2000); MINN. STAT. §§ 116C.53 and 216B.243 (2000).

10. *See* Berthelsen, *Genesis Of State's Energy Fiasco: String of bad decisions on deregulation could end up costing consumers $40 billion*, San Francisco Chronicle (Dec. 31, 2000), *http://www.sfgate.com/cgi-bin/ article.cgi?f'/chronicle/archive/2000/12/31/MN167927.DTL*; Purdom, *California's Power Crisis Replays Familiar Theme*, New York Times, (Jan. 25, 2001), *http://www.nytimes.com/2001/01/25/national/25CALI.html;* Oppel, *Independent Firms a Growing Factor in Latest Energy Crisis*, New York Times (Jan. 23, 2001), *http://www.nytimes.com/2001/01/23/business/23UTIL.html*; Berthelsen and Winokur, *State Probing Power Companies Scheme?*, San Francisco Chronicle (Jan. 14, 2001), *http://www.sfgate.com/cgi-bin/article.cgi?file'chronicle/archive/2001/01/14/MN115295.DTL*

unneeded plants are not built and that Florida utility customers are not left empty-handed by the independent producers whose generation capacity was expected to be available but who have made no contractual commitment to supply their needs.

B. The Incidental Effect on Interstate Commerce is Far Outweighed by the Public Benefits of the Need Provision.

This Court has recently noted that the Commerce Clause was never intended to prevent the states from legislating to protect public welfare. *General Motors*, 519 U.S. at 306. Thus, where a statute regulates evenhandedly to effectuate a legitimate state interest and has only incidental effects on interstate commerce, it will be upheld so long as the burden on commerce does not clearly exceed the local benefits. *Id.*; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

As demonstrated above, the Need Provision is an environmental measure that protects the state against the harmful effects of unneeded power plants. Requiring a determination of need for each new power plant has been found by the Florida legislature to strike a reasonable balance between the need for new generation capacity and the need to protect Florida's sensitive environment. *See* FLA. STAT. §§ 403.501, 403.502(2).

This Court has long recognized the great public importance of state regulations that protect the environment and natural resources. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981); *Northwest Central*, 489 U.S. at 518-19, 522. It has also recognized that it is impossible to impose environmental restrictions without having an incidental effect on commerce. *See Clover Leaf*, 449 U.S. at 473-74. Likewise, the Court has found regulation of utilities for the purpose of consumer protection to be a legitimate state regulatory goal. *See General Motors*, 519 U.S. at 304-306; *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983).

The Need Provision serves these permissible goals in a reasonable manner, and has, at most, only an incidental impact on interstate commerce. It does not preclude anyone from participating in the Florida electric market, and merely sets reasonable conditions on new power plant construction. The paramount state interests served by the state regulatory scheme — protection of the environment and consumer interests from the impacts of unneeded power plants — far outweigh its incidental effects on commerce. It therefore easily passes the balancing test set forth in *General Motors* and *Pike*.

The principal case cited by the Petitioner on this point, *Buck v. Kuykendall*, 267 U.S. 307 (1925), is unavailing, and actually highlights the fact that the Need Provision permissibly serves a legitimate state interest. In that case, the Court was presented with a commerce clause challenge to a Washington statute that required a license for the operation of an interstate transportation service over state highways. *Id.* at 325. Writing for the majority, Justice Brandeis noted that Washington allowed all persons to use its highways for noncommercial purposes, but imposed special restrictions that effectively granted monopolies on interstate transportation to certain commercial carriers. The Court drew a distinction between legitimate and rational resource conservation measures and those designed solely to impede commerce. In the words of Justice Brandeis the Washington requirement violated the dormant Commerce Clause because it was "not regulation with a view to safety or to conservation of the highways, but the prohibition of competition." *Id.* at 315-16.

The Need Provision clearly falls on the permissible side of Justice Brandeis' dichotomy. It was not enacted to discriminate among users of state resources. It is, instead, the equivalent of a law enacted for "conservation of the highways," as it protects the state's limited natural resources and sensitive environment from the adverse effects of unnecessary electric power plants. Moreover, unlike the Washington statute, the Need Provision

does not discriminate against certain developers. *Anyone* wishing to build a large new power plant in Florida must prove that it will serve a specific and proven retail need. The statute regulates rationally and evenhandedly and would clearly be upheld under the reasoning of *Buck*.

CONCLUSION

The arguments raised by Petitioner do not warrant review in this Court. It is worth noting that Florida is currently considering revisions to the laws regulating electric utilities, including the Need Provision. This effort was initiated by the Governor, who convened a special commission, the Florida Energy 2020 Study Commission, to advise the state on whether to restructure its electric regulatory system. The commission's recommendations are to be presented to the state legislature for debate and consideration later this year. As this Court noted in *General Motors*, the question of how best to regulate a market for a public utility, taking into account the strong public need for reliable, uninterrupted and economical service, is best resolved by the political branches, which have the institutional competence and broad powers necessary to undertake such measures. 519 U.S. at 307. Given that Congress has left these matters to the states, and that the state in question is studying the issues involved, the Court should refuse the Petitioner's invitation for judicial intervention.

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